No. 03-13

Supreme Court, U.S.
DEC 19 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR BET TZEDEK LEGAL SERVICES AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* SUPPORTING RESPONDENT

DAVID J. BEDERMAN
Counsel of Record
LARA M. PAIR
GAMBRELL HALL
Atlanta, GA 30322
(404) 727-6822

MITCHELL A. KAMIN
BET TZEDEK LEGAL SERVICES
145 South Fairfax Avenue
Suite 200
Los Angeles, CA 90036
(323) 939-0506

JANIE F. SCHULMAN
SHEILA O. RECIO
MORRISON & FOERSTER LLP
555 West Fifth Street
Suite 3500
Los Angeles, CA 90013
(213) 892-5200

JEFFREY P. SINENSKY
DANIELLE A. SAMULON
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, NY 10022
(212) 751-4000

Attorneys for Amici Curiae

184846

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	ii
Statement Of Interest Of *Amici Curiae*	1
Summary Of Argument	3
Argument	4
I. U.S. Practice Contemporaneous With The 1952 Tate Letter Would Have Permitted Mrs. Altmann's Suit To Proceed.	4
II. Long Before 1952, Austria Had Accepted The Restrictive Theory Of Foreign Sovereign Immunity, Thus Estopping The Position It Now Takes Here.	8
III. Consistent With Its Duties Under The 1907 Hague Convention (IV), Austria Has Countenanced Suits For Recovery Of Looted Artworks.	13
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 4, 5, 6

American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374 (2003) 11

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 16

Dralle v. Republic of Czechoslovakia, 17 INT'L L. REP. 155 (Sup. Ct. of Austria 1950) ..... *passim*

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 6

Statutes and Rules

Foreign Sovereign Immunites Act of 1976, 28 U.S.C. §§ 1602, *et seq.* ..... *passim*

28 U.S.C. § 1605(a)(1) 16

28 U.S.C. § 1605(a)(3) 6

28 U.S.C. § 1605(a)(4) 6, 7

SUP. CT. R. 37.3(a) 1

SUP. CT. R. 37.6 1

Page

Other Authorities

1907 Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 1907 U.S.T. LEXIS 29 ..... 13, 14, 15, 16

1998 Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 15

H.R. REP. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 7

Judgment of Dec. 17, 1907, 21 Röll, *EISENBAHNRECHTLICHE ENTSCHEIDUNGEN*, No. 122 (1907) 8, 9

Judgment of Jan. 5, 1920, II ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN, No. I 8, 9

Judgment of Mar. 13, 1918, 44 BUNDESGERICHTS ENTSCHEIDUNGEN I 54 (Swiss Fed. Trib. 1918) 13

Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1952) 26 Dept. State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 452 U.S. 682 (1976) 4, 5, 6

Cited Authorities

Page

Roerich Pact, the Treaty on the Protection of Artistic and Scientific Institutions and Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 889 15

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Bet Tzedek Legal Services ("Bet Tzedek"), "The House of Justice", is a non-profit, pro bono legal services agency that provides free, high quality, compassionate legal representation to thousands of low-income residents. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds and regularly represents survivors of the Holocaust completely free of charge, in their efforts to secure reparations as compensation for the horrors endured during the World War II era. Presently, Bet Tzedek represents more than 800 such clients, each asserting claims under foreign-based programs or United States-based litigation. Bet Tzedek represents these clients through the efforts of its full-time staff and assistance of more than 400 volunteer attorneys.

The claims of many of Bet Tzedek's clients depend upon their ability to assert jurisdiction against foreign sovereign states under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602, *et seq.* The interests of Bet Tzedek's clients, therefore, are likely to be greatly influenced by this Court's determination of the applicability of the FSIA to Holocaust era atrocities.

The American Jewish Committee ("AJC") is a national, not-for-profit, human relations organization, founded in 1906 to protect the civil and religious rights of Jews the world

---

1. Pursuant to SUP. CT. R. 37.6, *amici* Bet Tzedek and AJC warrant that this brief was authored entirely by counsel for *amici curiae* and no one other than *amici* made a monetary contribution to the preparation or submission of this brief. Pursuant to SUP. CT. R. 37.3(a), this brief is filed with the written consent of all parties, whose letters of consent have been lodged with the Court.

over, and to combat anti-Semitism and other forms of bigotry. It maintains 32 regional offices in major cities nationwide and has more than 125,000 members and supporters. With offices in Berlin, Geneva, and Warsaw, AJC is in frequent contact with European governments and European Jewish community leaders.

AJC has a long history of active involvement with restitution and indemnity claims on behalf of Jewish survivors of the Holocaust. Since before the end of World War II, AJC has played an integral role in advocating for rehabilitation and resettlement programs, restitution, and the return of Jewish assets to Holocaust survivors and their heirs. In furtherance of its goal to ensure that survivors live in dignity, security and peace, AJC, together with a few other organizations, engaged in a series of direct negotiations with the German and Austrian governments beginning in the late 1940s and 1950s. It was a founding member of the Conference on Jewish Material Claims Against Germany and of the Committee for Jewish Material Claims on Austria, which resulted in a 1955 agreement providing for some reparations to victims of Nazism in Austria.

In more recent years AJC has been an active participant in the various discussions and negotiating efforts to secure the restitution of former Jewish communal and private property. It was an official participant in the Washington Conference on Holocaust-Era Assets in 1998 and in the Vilnius Conference on Looted Jewish Cultural Assets in 2000. AJC representatives have offered testimony on the subject before the Senate Foreign Relations Committee, the House Banking Committee, and the Commission on Security and Cooperation in Europe, and before the Parliamentary Assembly of the Council of Europe in Strasbourg.

SUMMARY OF ARGUMENT

The primary submission made by Petitioners and their *amici curiae* rests on a startlingly inaccurate legal conclusion – that Austria would have successfully claimed immunity if this case had been adjudicated prior to the FSIA's enactment in 1976. In fact, under the relevant international law in force at the time that the operative events of this case arose (variously determined as between 1925 and 1948), Austria would *not* have been immune from a suit such as this for restitution of artworks that it claimed by virtue of succession, gift, bona vacantia, or escheat.[2] This conclusion is supported not only by the United States' practice and policy statements contemporaneous with the issuance of the Tate Letter in 1952, but also by Austria's own state practice as to foreign sovereign immunity in expropriation claims and by other background rules derived from customary international law and treaties binding on Austria and the United States.

Despite the narrow factual circumstances of this case, Petitioners and their *amici* seek an awesomely broad ruling from this Court rejecting any possible retroactive effect of the FSIA to events and causes of action arising prior to its enactment in 1976. There is simply no reasoned ground for the Court to make such a ruling here. Not only is such unnecessary given this Court's jurisprudence concerning the retroactive effect to be given to jurisdictional statutes such as the FSIA (an issue briefed fully by Respondent), but also no contrary result is dictated by international law nor by any compelling foreign policy interests of the United States.

2. At bottom, this case concerns a foreign state's claim of immunity to a suit for restitution of artworks Petitioners concede were either the subject of a deed of gift by Respondent's predecessors-in-interest or an exercise of escheat by the Austrian government. *See* Pet'r Br. at 5-8.

ARGUMENT

I. U.S. PRACTICE CONTEMPORANEOUS WITH THE 1952 TATE LETTER WOULD HAVE PERMITTED MRS. ALTMANN'S SUIT TO PROCEED.

Both Petitioners and their *amici curiae* have made much of the May 19, 1952 letter addressed by Acting State Department Legal Advisor, Jack B. Tate, to the Attorney General ostensibly announcing a "new" U.S. policy of restrictive foreign sovereign immunity. *See* Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1952) 26 Dept. State Bull. 984-85 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976), attached as "Appendix A" to Petitioners's Brief. A careful review of this communication reveals, however, that the established position of the United States – including the Executive Branch and the Courts – would have been to *deny* Austria's claim of immunity in a case such as this. The key language of the Tate Letter makes the following crucial distinction:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with

> respect to private acts (*jure gestionis*). *There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions* with respect to real property (diplomatic and perhaps consular property excepted) or *with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary*.

425 U.S. at 711-12 (emphasis added); Pet'r Br. at App. 1a-2a (emphasis added). Thus, the Tate Letter confirms that whether the absolute or restrictive theory of sovereign immunity applies, Austria could not claim immunity with respect to restitution of the artworks taken here.

The Tate Letter further explains that Austria had, in fact, adopted the restrictive view of foreign sovereign immunity by the 1920s:

> The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory.

425 U.S. at 712; Pet'r Br. at App. 3a.

As the Tate Letter also made express, the restrictive theory of foreign sovereign immunity would grant immunity to a foreign State for its sovereign or public acts (*jure imperii*), but not for private acts (*jure gestionis*).

See 425 U.S. at 711-12; Pet'r Br. at App. 1a-2a. This distinction was first noted by Chief Justice Marshall writing in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), where he observed the following:

> [T]here is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; . . .

Id. at 145. And while Petitioners and their *amici curiae* attempt to portray the operative events of this case as somehow implicating Austria's public or sovereign acts, in actuality Austria's claim to the artworks in this case depends on a series of private transactions, really no different than those referred to by Chief Justice Marshall in *The Schooner Exchange*.

The 1952 Tate Letter thus contemplated situations in which a foreign sovereign would be sued for actions in respect to movable property in which the foreign sovereign claimed an interest via succession, gift, bona vacantia, or escheat. When this principle was codified in the 1976 FSIA, Congress actually located this principle in two sections of the statute – once in section 1605(a)(3), which is the subject of the current case, as well as in section 1605(a)(4), which provides that a

foreign State shall not be immune in cases "in which rights in property in the United States acquired by succession or gift . . . are in issue". 28 U.S.C. § 1605(a)(4).

When read together, it is clear that these two provisions are derived from the pre-existing customary international law and U.S. practice which refused to grant immunity to foreign States in which at issue were fundamentally private law relationships such as gifts, donations, and succession, or even exercises of quasi-governmental authority such as escheat or bona vacantia. As Congress noted in adopting this section of the FSIA, following from the 1952 Tate Letter,

> There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. . . . The reason is that, in claiming rights in a decedent's estate if obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

Foreign Sovereign Immunities Act of 1976, H.R. REP. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6619. In short, based on the 1952 Tate Letter – which Petitioners and their *amici curiae* agree is the authoritative statement of U.S. foreign sovereign immunity policy contemporaneous with the crucial operating events of this case – Austria would not have been immune in United States courts from Mrs. Altmann's suit for replevin of the disputed artworks.

II. LONG BEFORE 1952, AUSTRIA HAD ACCEPTED THE RESTRICTIVE THEORY OF FOREIGN SOVEREIGN IMMUNITY, THUS ESTOPPING THE POSITION IT NOW TAKES HERE.

As already noted, the restrictive theory of foreign sovereign immunity limits a foreign sovereign's immunity against suit. In Austria, this theory was first accepted by the Austrian Supreme Court (the Oberster Gerichtshof) in its Judgment of Dec. 17, 1907, *reprinted in* 21 Röll, EISENBAHNRECHTLICHE ENTSCHEIDUNGEN No. 122 (1907), and cited in *Dralle v. Republic of Czechoslovakia*, 17 INT'L L. REP. 155, 156 (Sup. Ct. of Austria 1950). Austria's acceptance of the restrictive theory of foreign sovereign immunity was again upheld in 1920, when the Austrian Supreme Court permitted the Ottoman State to be sued in an Austrian court over a contract dispute arising from the construction of diplomatic premises in Vienna. See Judgment of Jan. 5, 1920, II ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN ["SZ"] No. I, cited and extracted in *Dralle*, 17 INT'L L. REP. at 156.

Most telling of all is the case of *Dralle v. Republic of Czechoslovakia*, 17 INT'L L. REP. 155 (1950), in which the Austrian Supreme Court held that Czechoslovakia had no immunity in an Austrian court in a dispute concerning Czechoslovakia's expropriation, in 1945, of intellectual property owned by an Austrian and German concern. Not only is the nature of the case instructive, but the time frame is decisive for any determination of what Austria's reasonable expectations as to foreign sovereign immunity would have been in the years in question in this case, from 1925 to 1948. In *Dralle*, the Austrian Supreme Court determined that the doctrine of absolute immunity was no longer applicable and

had in fact been abandoned by Austria at the beginning of the twentieth century. *See id.* at 162 (citing Judgment of Dec. 17, 1907, 21 Röll, *EISENBAHNRECHTLICHE ENTSCHEIDUNGEN*, No. 122 (1907), as well as the Judgment of Jan. 5, 1920, SZ II/I). The Austrian Supreme Court concluded in *Dralle* that foreign sovereigns were simply not immune in Austria's tribunals for suits implicating the commercial or proprietary interests of a foreign sovereign, even where that foreign sovereign's public acts of expropriation or nationalization were being challenged. *See Dralle*, 17 INT'L L. REP. at 163. Due to the determination of its own Supreme Court that international law no longer supported absolute immunity, Austria was clearly no longer expecting to receive immunity from suits involving expropriations. So long before the events giving rise to this case occurred, Austria had effectively waived its own sovereign immunity from suits raising causes of action under a restrictive theory of foreign sovereign immunity.

While studiously avoiding the point that Austria had, by 1950, fully embraced the restrictive theory of foreign sovereign immunity, the *amicus* brief of the United States nonetheless contends that Austria remains protected from suit in this case. This submission is meritless. The United States appears to argue that the restrictive theory of foreign sovereign immunity inherently excluded public acts, thus providing continued protection from suit when public acts are involved. A protected public act, the United States argues, would have included expropriation of private property. Thus, according to United States interpretation of the restrictive theory of foreign sovereign immunity, nationalizations/ expropriations by the United State government would not have given rise to a waiver of sovereign immunity. The United States thus concludes that Austria also would have expected

to remain immune form suits concerning expropriation of private property. This conclusion is based on the assumption that the Austrian interpretation of the restrictive theory and Austrian expectations of receiving the protection of foreign sovereign immunity relating to expropriations coincided with American interpretations or expectations.

The above assumption is flawed for two reasons. First, Austria did not enter into treaties with other foreign sovereigns providing for the return of expropriated property, but provided means to reclaim expropriated property in its own courts. Second, Austrian jurisprudence clearly indicates that Austria was inclined to abandon the doctrine of absolute immunity for other sovereigns in its own courts in cases involving expropriation.

First: Austria, unlike many other countries, did not enter into treaties after the Second World War with foreign powers to set a procedure for the return of expropriated property to the original owners. Countries like the former Yugoslavia, Bulgaria and others[3] entered into treaties with the United States to settle claims for expropriated property. These treaties provided means created through diplomatic channels to create a possibility for resolution of individual claims. However, neither the United States nor Austria has cited a similar treaty establishing international claims settlement for individuals.

Although Austria never entered into treaties effectuating the potential of resolution of individual claims, Austria insists

3. These and other countries are cited by the United States *amicus* brief for the proposition that diplomatic means were used, but the brief fails to cite to even one treaty in which Austria entered to the same effect. *See* U.S. Br. at 14, n.8.

that diplomatic means are the only appropriate solution. Austria relies on *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), for the proposition that expropriations were the subject of diplomacy rather than litigation. Even if Austria could have its cake and eat it too – insisting diplomatic means are the sole solution but never creating an effective claims settlement mechanism – its reliance on *Garamendi* is still misplaced. Unlike in *Garamendi*, Austria is very adamant about having been a liberated Nation, not a defeated power. *Amici* will not question that assertion, believing that such a characterization is properly vested in the determination of the political branches of the government. But while Austria correctly asserts that reparations were an important goal after World War II, Austria, as liberated nation, was not obliged to pay reparations, creating a void for claimants such as Mrs. Altmann.

The fact that other countries did enter into diplomatic solutions with each other gives further evidence that Austria did not and could not possibly expect to reap the benefits of Nazi-era expropriations. By its own admission, Austrian courts have been available for claims by aggrieved individuals arising from acts of the Austrian government and its instrumentality. The only question for determination by this Court is whether Austria would have had any expectation of immunity in a foreign tribunal based on the same acts.

Second: Austria did not expect to be immune from suits brought in foreign tribunals in cases involving expropriations, because Austrian jurisprudence plainly demonstrates that Austria considered suits against sovereign nations concerning the return of formerly expropriated property admissible in its own courts. Unlike American jurisprudence, Austrian decisional law clearly favored admissibility of suits in

expropriation cases. And while Petitioners and their *amici* conveniently overlook the importance of the 1950 *Dralle* decision and its significant precursors, they are, instead, appearing to argue that municipal law should not determine the outcome of an issue of foreign sovereign immunity under international law. While that may be true in certain cases, in this case, municipal law reflects Austria's interpretations of international law and controls its expectations of immunity in courts outside of Austria.

Japan, in its *amicus* brief argues that Austria's adoption of the restrictive theory would not necessarily result in a lack of expectation of immunity by Austria. *See* Japan Br. at 19. Without conceding the point whether expropriations are included in the restrictive theory, it is manifest that the Austrian Supreme Court's 1950 decision in *Dralle* stripped foreign sovereigns of their immunity in expropriation cases brought in Austrian tribunals, and specifically determined that the theory behind the exercise of jurisdiction in an expropriation case does not rule the outcome of the case: "[W]e are, in any event, entitled to say that such submission of sovereign States in matters of private law is regarded as being admissible in international law." *Dralle*, 17 INT'L L. REP. at 162.

The United States also appears to assert that Austria's treatment of claims by its own courts against other foreign States would not preclude Austria from asserting foreign sovereign immunity in jurisdictions that still adhered to the absolute doctrine. But in asserting sovereign immunity in a foreign court, Austria's expectations for success would have been mixed at best. This is especially so since Austria had earlier been on notice that it would be subject to suit in foreign tribunals based on commercial claims including expropriation

theories. *See* Judgment of Mar. 13, 1918, 44 BUNDESGERICHTS ENTSCHEIDUNGEN I 54 (Swiss Fed. Trib. 1918). In that case, the Swiss Federal Tribunal (the highest court in that jurisdiction) surveyed international law and determined that it was no longer appropriate for Austria to claim foreign sovereign immunity.

III. CONSISTENT WITH ITS DUTIES UNDER THE 1907 HAGUE CONVENTION (IV), AUSTRIA HAS COUNTENANCED SUITS FOR RECOVERY OF LOOTED ARTWORKS.

The court of appeals below concluded that Austria's adherence to the 1907 Hague Convention (IV) on the Laws and Customs of War on Land ["Hague Convention (IV)"], Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910), signified that Austria could not "legitimately expect to receive immunity from the executive branch of the United States for its complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings." J.A. at 50a. While Petitioners attempt to dismiss this holding as "simply wrong," Pet'r Br. at 28, the relevant provisions of the Hague Convention (IV), when read alongside the Austrian jurisprudence concerning the denial of foreign sovereign immunity, reveal that Austria had accepted the obligation not to regard the looting of artworks, or, indeed any seizure of art, as a "sovereign" act that would immunize a State from court proceedings in other countries.

Article 56 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV), provides:

> The property of municipalities, that of institutions dedicated to religion, charity and educations, the

> arts and sciences, even when State property, shall be treated as private property. [¶] All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Hague Convention, Art. 56, 36 Stat. at 2309, 1907 U.S.T. LEXIS 29, at *40. The first salient point about this provision is that it converts the object of what would otherwise be a sovereign act of expropriation, nationalization, looting or booty into "private property." An object of art which has been claimed by a sovereign under these circumstances would be endowed with a private character, thus defeating an assertion by the expropriating State that its conduct was a sovereign or proprietary act that would be immune from suit under principles of foreign sovereign immunity.[4] Under the Austrian Supreme Court's 1950 ruling in *Dralle v. Czechoslovakia*, a government taking of private property would be an *acta gestionis* that would not be accorded sovereign immunity. *See* 17 INT'L L. REP. at 163.

The other crucial point of Hague Convention (IV)'s Regulation Art. 56 is its requirement that seizures of artworks

4. Petitioners' suggestion that Hague Convention (IV) Regulation Art. 56 is inapplicable because duties run only to occupying powers, Pet'r Br. at 28, is not borne out by the text of the instrument. The Convention required that all "contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Law and Customs of War on Land, annexed to the present Convention." Hague Convention, Art. 1, 36 Stat. at 2290, 1907 U.S.T. LEXIS 29, at *17. Moreover, even if true, Germany was a contracting Power to Hague Convention (IV).

"should be made the subject of legal proceedings." Hague Convention, Art. 56, 36 Stat. at 2309, 1907 U.S.T. LEXIS 29, at *40. This language is unique in the treaty, and plainly conveys an obligation by a signatory State to permit judicial proceedings to determine the proper ownership of artworks that may have been the subject of confiscation (or other changes in ownership) during a period of belligerent occupation. Additionally, article 3 of the main body of the Hague Convention (IV) provides that a party "which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation." Hague Convention, Art. 1, 36 Stat. at 2290, 1907 U.S.T. LEXIS 29, at *17-18. These two provisions taken together create a legal obligation on the part of States to provide a legal mechanism to ensure the proper restitution of artworks which were the subject of confiscations or other related measures during wartime.

The United States has accepted this obligation, as well, not only as a party to Hague Convention (IV), but also the Roerich Pact, the Treaty on the Protection of Artistic and Scientific Institutions and Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 889, which contains parallel provisions. Moreover, the United States Congress, in the 1998 Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15, found that "[e]stablished pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art." *Id.* at § 201. Thus:

> It was the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate

> the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Id. at § 202.

Petitioners's assertion that Hague Convention (IV)'s obligations do not constitute an express or implied waiver of immunity, Pet'r Br. at 29, is quite beside the point. The issue is not the one this Court considered in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), whether a particular treaty constituted a waiver of foreign sovereign immunity within the scope of 28 U.S.C. § 1605(a)(1). *See* 488 U.S. at 442 (considering the FSIA exception for situations "in which the foreign state has waived its immunity either explicitly or by implication"). Rather, the point is that Austria was on sufficient notice, in the early 1950s, that its conduct could give rise to an action brought in a foreign tribunal to which it could not properly claim sovereign immunity. Given that Hague Convention (IV) Regulation 56 constitutes a clear duty to permit restitutionary or replevin actions for confiscated artworks to proceed, and that Austria had (in the *Dralle* decision in 1950) confirmed that expropriation cases could be brought against foreign sovereigns in its own courts, Austria was certainly aware that it would be subjected to suits concerning restitution of artworks that it claimed by virtue of events arising from the occupation of its territory.

CONCLUSION

The judgment of the court of appeals should be AFFIRMED.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
LARA M. PAIR
GAMBRELL HALL
Atlanta, GA 30322
(404) 727-6822

MITCHELL A. KAMIN
BET TZEDEK LEGAL SERVICES
145 South Fairfax Avenue
Suite 200
Los Angeles, CA 90036
(323) 939-0506

JANIE F. SCHULMAN
SHEILA O. RECIO
MORRISON & FOERSTER LLP
555 West Fifth Street
Suite 3500
Los Angeles, CA 90013
(213) 892-5200

JEFFREY P. SINENSKY
DANIELLE A. SAMULON
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, NY 10022
(212) 751-4000

Attorneys for Amici Curiae